

5-1-2003

## Two Case Studies in Self-Determination: The Rock and the Bailiwick

Inge V. Porter

Follow this and additional works at: <https://digital.sandiego.edu/ilj>



Part of the [Courts Commons](#), [European Law Commons](#), [International Law Commons](#), and the [Legal History Commons](#)

---

### Recommended Citation

Inge V. Porter, *Two Case Studies in Self-Determination: The Rock and the Bailiwick*, 4 San Diego Int'l L.J. 339 (2003)

Available at: <https://digital.sandiego.edu/ilj/vol4/iss1/12>

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego International Law Journal* by an authorized editor of Digital USD. For more information, please contact [digital@sandiego.edu](mailto:digital@sandiego.edu).

# Two Case Studies in Self-Determination: The Rock and the Bailiwick

INGE V. PORTER\*

## TABLE OF CONTENTS

|      |  |     |
|------|--|-----|
| I.   | INTRODUCTION .....   | 340 |
| II.  | SELF-DETERMINATION .....   | 342 |
|      | A. <i>History</i> .....  | 342 |
|      | B. <i>General Scope and Content</i> .....  | 345 |
|      | 1. <i>Decolonization</i> .....   | 345 |
|      | 2. <i>Post-Decolonization</i> .....  | 349 |
|      | 3. <i>Historic Title</i> .....   | 350 |
|      | 4. <i>Limits to the Principle of Self-Determination</i> .....                                | 354 |
|      | C. <i>Microstates</i> .....  | 356 |
|      | D. <i>Future Trends</i> .....  | 357 |
|      | 1. <i>The Demise of the Principle of Self-Determination?</i> .....                           | 357 |
|      | 2. <i>Self-Determination as Customary Law</i> .....  | 358 |
|      | 3. <i>Self-Determination as a Right to a Democratic<br/>        Form of Government</i> ..... | 360 |
| III. | THE CASE OF GIBRALTAR .....  | 360 |
|      | A. <i>Introduction</i> .....   | 360 |
|      | B. <i>History of the Anglo-Spanish Dispute</i> .....   | 361 |
|      | 1. <i>Pre-1713</i> .....   | 361 |
|      | 2. <i>Treaty of Utrecht—1713</i> .....   | 361 |
|      | 3. <i>Post-1713</i> .....  | 362 |
|      | a. <i>The Committee of Twenty-Four</i> .....   | 362 |
|      | b. <i>Resolutions 2231 &amp; 2353</i> .....  | 363 |

---

\* J.D. candidate 2003, Indiana University School of Law-Indianapolis; LL.M. 1993, University of Nottingham, United Kingdom; J.D. 1992, University of Leuven, Belgium; LL.B. 1989, University of Antwerp, Belgium. The author wishes to thank Professors Jim Bailey and Tom Wilson for their support, and to J.M.B. Porter for his constant encouragement.

|     |  |     |
|-----|--|-----|
| c.  | <i>Anglo-Spanish Agreements to Negotiate<br/>Sovereignty Issues</i> .....                            | 364 |
| C.  | <i>Views of the Parties</i> .....  | 365 |
| 1.  | <i>Spain</i> .....   | 365 |
| a.  | <i>Interpretation of the Treaty of Utrecht</i> .....   | 365 |
| b.  | <i>The Right for Territorial Integrity</i> .....   | 366 |
| c.  | <i>British Acts Granting Sovereignty to Gibraltar<br/>is a Breach of the Treaty of Utrecht</i> ..... | 367 |
| 2.  | <i>Great Britain</i> .....   | 367 |
| a.  | <i>Cession to the Crown</i> .....  | 367 |
| b.  | <i>Self-Determination</i> .....  | 368 |
| c.  | <i>British Actions in Light of Resolution 2231<br/>and the Treaty of Utrecht</i> .....               | 369 |
| 3.  | <i>Gibraltar</i> .....   | 369 |
| D.  | <i>Is the Principle of Self-Determination Applicable to Gibraltar?</i> .....                         | 370 |
| 1.  | <i>Spain's Misguided Claims to Gibraltar</i> .....   | 370 |
| 2.  | <i>Failure of the International Community to Recognize<br/>Gibraltar's Right</i> .....               | 371 |
| 3.  | <i>Conclusion</i> .....  | 372 |
| IV. | <i>THE CASE OF THE CHANNEL ISLANDS</i> .....   | 373 |
| A.  | <i>Introduction</i> .....  | 373 |
| B.  | <i>History of the Channel Islands' Acquisition</i> .....   | 373 |
| C.  | <i>Claim of Title: Conquest, Occupation, or Prescription?</i> .....                                  | 375 |
| D.  | <i>Is There a Case for Self-Determination?</i> .....   | 378 |
| V.  | <i>CONCLUSION</i> .....  | 379 |

## I. INTRODUCTION

The more I think about the President's declaration as to the right of "self-determination," the more convinced I am of the danger of . . . such ideas . . . The phrase is simply loaded with dynamite. It will raise hopes which can never be realized. It will, I fear, cost thousands of lives . . . What a calamity that the phrase was ever uttered! What misery it will cause!<sup>1</sup>

After the First World War, the victorious powers assembled at Versailles were faced with the dilemma of how to govern the culturally varied territories of two defeated empires.<sup>2</sup> The American President Woodrow Wilson arrived in France armed with the new notion that all peoples had a right to self-determination.<sup>3</sup> At the time, President

---

1. ROBERT LANSING, *THE PEACE NEGOTIATIONS: A PERSONAL NARRATIVE* 97-98 (1921). Robert Lansing, Secretary of State, proclaimed his fears on December 30, 1918 in a response to President Woodrow Wilson's articulation of the principle of self-determination. See *id.*

2. Laurence S. Hanauer, Article, *The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case*, 9 EMORY INT'L L. REV. 133 (1995).

3. See Lung-Chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287, 1288 (1991).

Wilson's concept was primarily perceived as a moral and political right, which was not, as such, legally enforceable.<sup>4</sup> Virtually no precedent existed for the idea that "uncivilized" peoples had any legal right to be independent, choose their own government, and determine their own future.<sup>5</sup>

Since its first formal appearance during the negotiations that led to the Treaty of Versailles, the right of self-determination has become one of the most often invoked human rights of international law.<sup>6</sup> The United Nations facilitated the development of this right in a colonial context by pursuing the independence of trust territories and non-self-governing territories.<sup>7</sup> Nowadays, it has become a tool mostly used by sub-groups within countries to ensure their continued existence as a unique culture.<sup>8</sup> "While the world contains about [two hundred independent countries], there are about [three thousand] different linguistic groups and easily [five thousand] distinct national minorities."<sup>9</sup> Further, "[c]ontinued diversity is their goal, and self-determination is the banner under which they march to realize that goal, whether independently from the unified state in which they exist or within it."<sup>10</sup>

After looking at the concept of self-determination, its history, meaning, and possible future development in Part II, this paper will develop two case studies. Part III examines the right of self-determination for the people of Gibraltar, analyzing the relevant U.N. resolutions, agreements, treaties, and legislation that have defined the dispute between Great Britain and Spain. For example, Great Britain has ruled the Rock of Gibraltar for 280 years, primarily using it as a military base; but, today, Spain insists

---

4. See Hanauer, *supra* note 2, at 133.

5. *Id.*

6. Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-colonial Age*, 32 STAN. J. INT'L L. 255, 258 (1996).

7. See Chen, *supra* note 3, at 1289.

8. Michael J. Kelly, *Political Downsizing: The Re-Emergence of Self-Determination, and the Movement toward Smaller, Ethnically Homogenous States*, 47 DRAKE L. REV. 209, 211-12 (1999). Some of the better known groups and peoples claiming independence include the Kurds, the Quebecois, the Basques, the Scots, the Palestinians, the East Timores, the Tamils, the Karen peoples in Burma, the Ambonese and Aceh Merdeka in Indonesia, the Chittagong Hill Tribes in Bangladesh, the South Ossetians in Georgia, the Naga peoples in India, the Catholic Irish in Northern Ireland, and the Western Saharans under *de facto* control by the Moroccans. All of these groups claim some form of independence, and together they represent more than fifty million people. See Simpson, *supra* note 6, at 258-59, 259 n.18.

9. Kelly, *supra* note 8, at 212.

10. *Id.*

that it did not relinquish absolute sovereignty over Gibraltar to the British by the Treaty of Utrecht in 1713. Part IV examines the situation of the Channel Islands, specifically the Bailiwicks of Guernsey and Jersey, which are not strictly speaking, part of the United Kingdom, but are in “appenance”, or possessed by the British Crown. The Channel Islands came into Crown possession during the Norman Conquest of 1066 when they formed part of the Duchy of Normandy.<sup>11</sup> While being culturally distinct from the United Kingdom, the Channel Islands are governed under British rule.<sup>12</sup> Finally, Part V will conclude whether the case studies fall within the scope of self-determination, as currently understood by the world’s legal community.

## II. SELF-DETERMINATION

### A. History

At the beginning of history, there was the family.<sup>13</sup> The family grouped together into the clan or tribe.<sup>14</sup> “The tribe begot the nation and the nation begot the kingdom.”<sup>15</sup> Eventually, kingdoms became empires and empires became nation-states.<sup>16</sup> Conquest and subjugation of people as well as people’s revolts resisting this state expansion and annexation have been a constant theme throughout history.<sup>17</sup> These revolts and resurgences are known nowadays as self-determination.<sup>18</sup>

With the rise of nationalism and the establishment of the nation-states during the sixteenth century, self-determination became an important force.<sup>19</sup> The Treaty of Westphalia in 1648 represents the first known codification of these nationalistic principles into international law.<sup>20</sup> The nationalistic drives for self-determination were reinforced with the growth of empires during the eighteenth and nineteenth centuries.<sup>21</sup> Most commentators agree that the modern understanding of the principle of self-determination started with the dismantling of the Ottoman and

---

11. See *Channel Islands*, 3 THE NEW ENCYCLOPEDIA BRITANNICA 87 (15th ed. 1998).

12. See *id.*

13. Kelly, *supra* note 8, at 211.

14. *Id.*

15. *Id.*

16. *Id.*

17. See *id.*

18. See *id.* Self-determination is the legal term for the age-old force behind the Celtic, Pictish, and Jewish resistance of Roman domination; the Scottish revolts against the British Crown; the Arabic insurgence against the Ottoman Sultanate; and, the Native American fight against the United States. *Id.*

19. See Eric Kolodner, Essay, *The Future of the Right to Self-Determination*, 10 CONN. J. INT’L L. 153, 154 (1994).

20. See *id.*

21. See *id.*

Austro-Hungarian empires after the First World War.<sup>22</sup> The principle then served to maintain world order and peace; empires were divided into smaller nation-states on the belief that smaller and more culturally unified countries would better represent the will of those governed and therefore avert internal and international unrest.<sup>23</sup>

The principle of self-determination crystallized under the leadership of the American President Woodrow Wilson at the end of the First World War. In Wilson's words:

No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand people about from sovereignty to sovereignty as if they were property.<sup>24</sup>

However, the principle of self-determination was not accepted as part of international law at that time.<sup>25</sup>

After the Allied forces' victory in the First World War, the Treaty of Versailles<sup>26</sup> re-drew the world map by forcibly<sup>27</sup> breaking up empires so

22. *Id.*; Chen, *supra* note 3, at 1288; Hanauer, *supra* note 2, at 138.

23. Kolodner, *supra* note 19, at 154. *See also* Chen, *supra* note 3, at 1288.

24. 54 CONG. REC. 1741, 1742 (1917) (Address by President Woodrow Wilson, U.S. Senate, Jan. 22, 1917). This concept was included among President Wilson's Fourteen Points for peace. *See* Hanauer, *supra* note 2, at 138. A similar principle was at the time articulated by the Soviet leader Vladimir Lenin. *See* Kelly, *supra* note 8, at 214. Although the concept of each president was the same, the philosophies behind the concept were vastly different. *Id.* Lenin, while advocating violent secession, interpreted the principle as a means to liberate people from exploitative bourgeois governments in pursuit of a socialist regime. *Id.* Wilson, on the other hand, gave the concept a peaceful meaning wherein the consent of the governed to their sovereign was ascertained. *Id.* at 215.

25. *See* Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 3, 12 (1993). Although self-determination was advocated as a general principle after the First World War, neither President Wilson, nor the other Allies believed that the principle was absolute or universal. *Id.*

26. This peace treaty between the wartime coalition and Germany was signed at the royal palace of Versailles on June 28, 1919. *See* WILLIAM R. KEYLOR, *THE TWENTIETH-CENTURY WORLD: AN INTERNATIONAL HISTORY* 84 (3d ed. 1996).

27. Kelly, *supra* note 8, at 215. The actual map drawing was done with little regard to the wishes of the local populations. *Id.* at 215 n.23; ANTONIO CASSESSE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 24 (1995). Hardly any opportunity was given to peoples to express themselves through uniformly conducted plebiscites, as Wilson had envisioned. *See id.*

The exceptions include a plebiscite in North Schleswig, which had been [the object of a] dispute between Denmark and Prussia since the mid-nineteenth century; three plebiscites concerned with the Polish-German border. . . ; a plebiscite in the Klagenfurt Basin in 1920; a plebiscite in the small area of Sopron in dispute between Austria and Hungary; and the 1935 [plebiscite] in

smaller nation-states could emerge under President Wilson's philosophy of self-determination.<sup>28</sup>

After the war, the League of Nations<sup>29</sup> indirectly addressed the principle of self-determination through the creation of a system of mandates pursuant to article 22 of the League Covenant.<sup>30</sup> Believing that "the development of colonial people formerly under the [government] of the defeated countries was 'a sacred trust of civilization,' various members of the [Allied Forces] agreed to administer fourteen territories under the League's supervision."<sup>31</sup> These mandate countries' right to independence was not a legal right, but was rather considered to be a question of fact depending on whether the mandate is "able to stand by [itself] under the strenuous conditions of the modern world."<sup>32</sup> Although the League of Nations' Covenant did not grant outright independence to the mandates, it did make a significant step forward in the treatment of colonies by granting them certain legal rights and protections.<sup>33</sup>

Although the principle of self-determination had thus made its first appearance on the international stage, it was still regarded as a mere

---

the Saar region, which returned [this region] to Germany after fifteen years of French [rule].

Hannum, *supra* note 25, at 5.

28. Kelly, *supra* note 8, at 215.

[T]he Ottoman Empire [was reduced to present-day] Turkey and became a republic, while its former . . . Arab territories [were divided into] Iraq, Syria, Trans-Jordan, Lebanon, Palestine, and . . . Saudi Arabia; the Austro-Hungarian Hapsburg Empire disintegrated into Yugoslavia, Hungary, Czechoslovakia, and Austria; Poland emerged from the ashes of Eastern Germany, the Western portion of Czarist Russia, and the northeastern extremity of Austria-Hungary; and the Baltic Republics (Latvia, Lithuania, Estonia) and Finland were carved out of the Russian Empire.

*Id.*

29. The League of Nations was created in 1919 and sought to promote international co-operation, peace, and security. MALCOLM N. SHAW, *INTERNATIONAL LAW* 748–49 (1991). Because the United States and the Soviet Union refused to become members, the League of Nations was mainly a European-centered institution. *Id.* "It was formally dissolved in April 1946." *Id.*

30. Hannum, *supra* note 25, at 6. However, Article 22 itself refrains from mentioning the principle of self-determination. Hanauer, *supra* note 2, at 139.

31. Hannum, *supra* note 25, at 6. These fourteen territories included Iraq (administered by Great Britain), Palestine and Trans-Jordan (Great Britain), Syria and Lebanon (France), Tanganyika (Great Britain), Ruanda-Urundi (Belgium), British Cameroons (Great Britain), British Togo (Great Britain), French Cameroons (France), French Togo (France), Nauru (Great Britain), New Guinea (Australia), Western Samoa (New Zealand), South West Africa (South Africa), and the North Pacific Islands (Japan). *Id.* at 6 n.22.

32. LEAGUE OF NATIONS COVENANT art. 22(1). *See also* Hanauer, *supra* note 2, at 139.

33. Hanauer, *supra* note 2, at 139. The mandatory power must, for example, guarantee freedom of religion, prohibit the slave trade, and look after the well-being and development of the peoples. *Id.*

political principle, considered to be inferior to the more institutionalized international principles of state sovereignty and territorial integrity.<sup>34</sup> Indeed, when the principle of self-determination was included by President Roosevelt and Prime Minister Churchill in the Atlantic Charter in August 1941, Churchill proclaimed it to be applicable only to those “nations of Europe under the Nazi yoke”<sup>35</sup> and not to European colonial possessions.<sup>36</sup>

## *B. General Scope and Content*

### *1. Decolonization*

As the long process of decolonization began after the Second World War, the principle of self-determination made its reappearance on the international stage, evolving beyond Churchill's careful moralistic assertion and transforming itself into a “right”.<sup>37</sup> This right was only applicable to colonies; the principle remained a merely moral concept outside the colonial context.<sup>38</sup> While the United States unequivocally supported the principle of self-determination during the drafting of the U.N. Charter in 1945, the British view was more paternalistic.<sup>39</sup> Eager to support the nationalistic feelings in the European colonies, the United States was nevertheless hesitant about alienating its allies in the face of a newly perceived Soviet threat.<sup>40</sup> This American stance allowed the major colonial powers to influence the adoption of an imprecise principle of self-determination in the U.N. Charter.<sup>41</sup>

34. Kelly, *supra* note 8, at 215–16.

35. *Id.* at 216.

36. *See id.*

37. *See id.* at 216. *See also* Hannum, *supra* note 25, at 12; Simpson, *supra* note 6, at 265.

38. *See* Kelly, *supra* note 8, at 216. Despite continued claims of a right of secession by nationalistic groups in Africa, Asia, and the former Soviet Union, the international community has accepted no such right. International law does not contain a prohibition against secession, whether voluntarily or by use of force. It has never recognized a right to secede nor even identified the conditions that might give rise to the claim. *Id.*

39. Simpson, *supra* note 6, at 265. The Western powers initially refused to accept a principle of self-determination, fearful that it might be used to facilitate the dismemberment of their empires. An outright rejection of the principle of self-determination by the European powers was prevented by the American distaste for European colonialism. *Id.*

40. *Id.*

41. *Id.* at 265–66.



The principle of self-determination is mentioned only twice in the U.N. Charter.<sup>42</sup> Both times, the application is limited to “developing friendly relations among nations”<sup>43</sup> and in conjunction with the principle of “equal rights . . . of peoples.”<sup>44</sup> The reference to “peoples” includes groups beyond states and non-self-governing territories “whose peoples have not yet attained a full measure of self-government.”<sup>45</sup> The reference to friendly relations among “nations” carried no inference of ethnicity or culture; it merely reflected the name of an organization composed of states.<sup>46</sup> This equation of nation and state is evidenced in Article 1(4), which states that a purpose of the organization is its serving “as a center for harmonizing the actions of nations in the attaining of common ends.”<sup>47</sup>

The principle of self-determination was considered to be subordinate to the prohibition on the use of force, to the right of territorial integrity, and to the general commitment of ensuring peace and security; all of which were regarded as the foundation stones of the new post-war world order.<sup>48</sup> Furthermore, chapters XI and XII of the U.N. Charter stipulate that self-determination for non-self-governing and trust territories was to proceed according to a timeline dictated by colonial administrators;<sup>49</sup> after the adoption of the U.N. Charter, colonial powers had little incentive to support their colonies’ independence.<sup>50</sup> From 1946 onwards, the U.N. General Assembly devoted itself to monitoring non-self-governing and trust territories

---

42. Hannum, *supra* note 25, at 11. See also U.N. CHARTER art. 1, para. 2, art. 55.

43. U.N. CHARTER art. 1, para. 2. “[T]he French text of the Charter *does* refer to respect for the ‘right’ of self-determination, the ‘principe de l’égalité de droits des peuples et leur droit à disposer d’eux-mêmes.’” Hannum, *supra* note 25, at 11 n.40.

44. U.N. CHARTER art. 55.

45. Hannum, *supra* note 25, at 11; U.N. CHARTER art. 73.

46. Hannum, *supra* note 25, at 11.

47. U.N. CHARTER art. 1, para. 4; Hannum, *supra* note 25, at 11.

48. Simpson, *supra* note 6, at 266.

49. *Id.* Article 73(b) states that these powers must “develop self-government . . . according to the particular circumstances of each territory and its peoples and their varying stages of advancement.” *Id.*; U.N. CHARTER art. 73(b).

50. Simpson, *supra* note 6, at 267. Great Britain pledged to “guide colonial peoples along the road to self-government within the framework of the British empire.” *Id.* The French made their position clear at the 1944 Brazzaville Conference of Colonial Administrators: “[t]he aims of the work of civilization accomplished by France in its colonies exclude all idea of autonomy, all possibility of evolution outside of the French bloc of the Empire; the eventual establishment, even in the distant future, of self-government is to be dismissed.” *Id.* Portugal, Spain, Belgium and the Netherlands pursued variations on both of these colonial philosophies. Even the United States started to have doubts about this “right” to self-determination for territories within its sphere of influence. The Soviet Union, while formally upholding the right to self-determination in its Constitution, denied independence to several nations that became part of the Soviet “Empire” (Lithuania, Latvia, and Estonia) or which became satellite states (Poland, the former Czechoslovakia, and Hungary). *Id.* at 267–68.

and demanding the transmission of information regarding these territories from the colonial power.<sup>51</sup>

The United Nations' most significant and comprehensive effort towards defining the principle of self-determination is Resolution 1514 (XV),<sup>52</sup> the Declaration on the Granting of Independence to Colonial Peoples and Territories, which was proposed by the Soviet Union in 1960 and adopted by the United Nations on December 14, 1960.<sup>53</sup> Considered by some scholars to be the "Magna Carta" of decolonization,<sup>54</sup> Resolution 1514 (XV) declares that "all peoples have a right to self-determination,"<sup>55</sup> thereby abandoning the U.N. Charter's cautious granting of independence in favor of "a speedy and unconditional end to colonialism."<sup>56</sup> Its most radical departure from the U.N. Charter is contained in Principle Three, which states that "[i]nadequacy of political, economic, social, or educational preparedness should never serve as a pretext for delaying independence."<sup>57</sup>

Resolution 1514 (XV) raises some significant points. It does not recognize a right to representative government and freedom from discrimination (so-called "internal self-determination").<sup>58</sup> Furthermore, only those territories which have not yet attained independence can rely on the application of this resolution.<sup>59</sup> Additionally, Resolution 1514 (XV) is subordinate to the international principle of territorial integrity.<sup>60</sup> One day after it was adopted, the General Assembly adopted Resolution

51. See Edward A. Laing, *The Norm of Self-Determination, 1941-1991*, 22 CAL. W. INT'L L.J., 209, 213 (1992). Chapter XI of the U.N. Charter is a Declaration Regarding Non-Self Governing Territories, the main article of which is Article 73, whereby states administering non-self-governing territories must furnish the United Nations with information on a regular basis regarding the territories for which they are responsible. See Hannum, *supra* note 25, at 21. One hundred-five territories were designated as non-self-governing territories. *Id.* at 73 n.164.

52. G.A. Res. 1514(XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960).

53. Laing, *supra* note 51, at 215. The Declaration was accepted by 89 votes to none, with 9 abstentions. *Id.* Abstaining were Australia, Belgium, Dominican Republic, France, Portugal, South Africa, Spain, the United Kingdom, and the United States. D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 117 n.74 (4th ed. 1991).

54. See Simpson, *supra* note 6, at 269.

55. G.A. Res. 1514(XV) U.N. GAOR, 15th Sess., Supp. No. 16, para. 2, at 67, U.N. Doc. A/4684 (1960).

56. *Id.*

57. *Id.* para. 3, at 67.

58. Simpson, *supra* note 6, at 270.

59. *Id.*

60. See discussion *infra* Part II.B.3.

1541,<sup>61</sup> a cautious restatement of the U.N. Charter chapters dealing with dependent and trust territories.<sup>62</sup> This resolution also instituted guidelines on transmitting information on non-self-governing territories under Article 73 of the U.N. Charter.<sup>63</sup> However, Resolution 1541 conflicts with Resolution 1514 (XV) in that it upholds the provisions of the U.N. Charter which the latter denounces;<sup>64</sup> it does not reiterate the need for an immediate end to colonialism, but rather provides a number of alternatives to complete independence that are absent from the earlier resolution.<sup>65</sup>

In November 1961, a seventeen-state committee was formed by the U.N. General Assembly to make recommendations on the progress and implementation of Resolution 1514 (XV).<sup>66</sup> This committee was later expanded to include twenty-four states and accordingly became popularly known as the Committee of Twenty-Four. This committee performs most of the monitoring functions over the non-self-governing territories.<sup>67</sup>

A further milestone in the development of the principle of self-determination was the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations<sup>68</sup> (Declaration on Friendly Relations),

61. G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4651 (1960).

62. See Simpson, *supra* note 6, at 270 n.80. See also Laing, *supra* note 51, at 215; Hannum, *supra* note 25, at 13.

63. See generally Simpson, *supra* note 6, at 270 n.80. See also Hannum, *supra* note 25, at 13.

64. Simpson, *supra* note 6, at 270.

65. *Id.*

66. Laing, *supra* note 51, at 215.

67. See *id.*

68. As the title suggests, the Declaration on Friendly Relations addresses a wide range of issues. Part of the section concerned with self-determination is as follows:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principles . . . .

....  
The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions

adopted by consensus in 1970.<sup>69</sup> As the most recent major resolution on the principle of self-determination, it represents the highest development of U.N. law yet.<sup>70</sup> "It is no overstatement to say that the elaboration of the principle of self-determination in the 1970 Declaration provides the cornerstone of the United Nations approach to the concept."<sup>71</sup> Following previous U.N. Declarations, the Declaration on Friendly Relations also makes the principle of self-determination subordinate to the concept of territorial integrity.<sup>72</sup> However, this restriction only applies to states that have a government representing a territory's entire population without distinction as to race, creed, or color.<sup>73</sup>

## 2. *Post-Decolonization*

Whereas the Declaration of Friendly Relations was adopted within a political context, it also reflected the promotion of the principle of self-determination as a human right in other U.N. forums.<sup>74</sup> On the same day that the General Assembly adopted the Universal Declaration of Human Rights in 1948, the General Assembly requested the Commission on Human Rights to "continue to give priority in its work to the preparation of a draft Covenant on Human Rights and draft measures of implementation."<sup>75</sup> This commission's work eventually resulted in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both of which were adopted in 1966 and entered into force in 1976. Ratified by over 110 countries, Article 1<sup>76</sup> of both Covenants<sup>77</sup> contains the most universally

---

against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 123-24, U.N. Doc A/8028 (1970).

69. See generally Simpson, *supra* note 6, at 270; Hanauer, *supra* note 2, at 144; Hannum, *supra* note 25, at 14; Thomas M. Franck, Editorial Comment, *Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War*, 77 AM. J. INT'L L. 109, 115-16 (1983).

70. Simpson, *supra* note 6, at 271.

71. Robin C. A. White, *Self-Determination: Time for a Reassessment?*, 28 NETH. INT'L L. REV. 147 (1981).

72. See Hannum, *supra* note 25, at 16.

73. *Id.* at 17. See also Simpson, *supra* note 6, at 271.

74. See generally Hannum, *supra* note 25, at 17; Shaw, *supra* note 29, at 174-75.

75. G.A. Res. 217, U.N. GAOR, 5th Sess., 183d mtg., at 79, para. E, U.N. Doc A/810 (1948).

76. Article 1 of both Covenants reads as follows:

binding statement of the right of self-determination. However, both Covenants are unclear as to which “peoples” this right to self-determination applies and whether “peoples” must be distinguished from states or individuals.<sup>78</sup>

### 3. *Historic Title*

It is undeniable that a claim for self-determination challenges the internationally recognized principle of territorial sovereignty.<sup>79</sup> Territorial claims based on historic title arise when a state claims that a particular territory that belonged to it in the past should be returned, thereby negating the inhabitants’ right to self-determination.<sup>80</sup> As legal justification for their claim, claimant states refer to paragraph 6 of Resolution 1514 (XV) which states, “[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”<sup>81</sup> It has been argued that this paragraph applies to situations where the territorial integrity of a state was disrupted due to

---

1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171.

77. Hannum, *supra* note 25, at 18. During the debates leading up to the adoption of the Covenants, there was opposition of the inclusion of a right to self-determination by the European States. See Simpson, *supra* note 6, at 268. They argued that inclusion as a right was premature since self-determination was merely a principle. *Id.* at 268–69. However, the Afro-Asian bloc successfully argued that self-determination was the most important human right and should supersede the enjoyment of all other rights. *Id.* at 269.

78. See Simpson, *supra* note 6, at 268.

79. See THOMAS D. MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES 239 (1997).

80. *Id.* “‘Historic Title’ forms the basis of claims by Ireland to Northern Ireland, Japan to the Southern Kurile Islands . . . , Togo to British Togoland which was annexed to Ghana, Spain to Gibraltar,” Argentina to the Falkland Islands. See Franck, *supra* note 69, at 118.

81. G.A. Res. 1514(XV). U.N. GAOR, 15th Sess., Supp. No. 16, para. 6 at 67, U.N. Doc A/4684, (1960). See also MUSGRAVE, *supra* note 79, at 239.

war or colonization; a return of the territory would restore the state to its historical boundaries.<sup>82</sup> Consequently, the inhabitants of a territory subject to a claim of historic title are precluded from exercising their right to self-determination because the only status available to them is annexation to the claimant state.<sup>83</sup> This means that although paragraph 2 of Resolution 1514 (XV) declares a right to self-determination to all peoples, the application of this right is prevented by the existence of an historic title.<sup>84</sup>

During the negotiations leading to the acceptance of Resolution 1514 (XV), this interpretation was rejected by several states. Most states voting for paragraph 6 of Resolution 1514 (XV) did so in the understanding that the right of self-determination was granted to colonies but was not extended to parts of decolonized states.<sup>85</sup> Although this interpretation seems to be more literally accurate,<sup>86</sup> other countries accepted the opposite interpretation<sup>87</sup> whereby the historic claim preempts the right to self-determination.<sup>88</sup>

---

82. See generally MUSGRAVE, *supra* note 79, at 239; S.K.N. Blay, *Self-Determination versus Territorial Integrity in Decolonization*, 18 N.Y.U. J. INT'L L. & POL. 441, 443-44 (1986).

83. See MUSGRAVE, *supra* note 79, at 239.

84. See generally *id.* at 239-40; Blay, *supra* note 82, at 444-45.

85. Thomas M. Franck & Paul Hoffman, *The Right of Self-Determination in Very Small Places*, 8 N.Y.U. J. INT'L L. & POL. 331, 370 (1975). This was the position of the United Kingdom. MUSGRAVE, *supra* note 79, at 240. The British delegation to the United Nations pointed out that the word "attempt" in paragraph 6 indicates future action and thus cannot be used to redress historic territorial claims. *Id.* Therefore, "its aim is . . . to protect 'colonial territories or countries which have recently become independent against attempts to divide them . . . at a time when they are least able to defend themselves.'" *Id.*

86. MUSGRAVE, *supra* note 79, at 240. See also Blay, *supra* note 82, at 444; Franck & Hoffman, *supra* note 85, at 370.

87. MUSGRAVE, *supra* note 79, at 240. These other countries are Indonesia, Guatemala, Iran, Afghanistan, and Morocco. *Id.*

88. See *id.* During the drafting of Resolution 1514 (XV), Guatemala requested the inclusion of a sentence to paragraph 2 so that the right of self-determination would not "impair the right of territorial integrity of any state or its right to the recovery of territory." *Id.* This proposal was withdrawn before it could be put to vote. *Id.* "Jordan, for example, believed that '[t]he usurpation of a part of the Arab territory of Palestine by the joint aggression of colonialism and Zionism' constituted an example . . . where the [historic claim] take[s] precedence over [the right] to self-determination." Franck & Hoffman, *supra* note 85, at 370 (citation omitted). "Similarly, Indonesia [considered] paragraph 6 as an invitation for the absorption of the Dutch colony of Western New Guinea regardless of the preferences of the inhabitants." *Id.* In addition, Morocco indicated that it considered paragraph 6 as a counteraction to the "silent tactics of the viper—of French colonialism—to partition Morocco and disrupt its national unity, by

Two judicial opinions of the International Court of Justice (ICJ) elaborated on the relationship between the right to self-determination and historic title. In the 1971 Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (*Namibia*),<sup>89</sup> the ICJ held that “the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination available to all [nations].”<sup>90</sup> Judge Amoun, in a separate opinion, elaborated on Resolution 1514 (XV) by focusing on the development of international law through the U.N. Charter and the Resolutions thereunder.<sup>91</sup> Whereas the ICJ considered the right to self-determination to be a rule of internal U.N. law, Judge Amoun seems to construct this right as part of international customary law.<sup>92</sup>

Four years after *Namibia*, the ICJ reaffirmed its position in the 1975 Western Sahara case (*Western Sahara*), the so-called “sleeping dogs of historic title” case.<sup>93</sup> The ICJ was asked to determine, in an advisory opinion, the legal ties between the Western Sahara with respectively Morocco and Mauritania.<sup>94</sup> Both claimant states based their claim on an historic title.<sup>95</sup> In its opinion, the ICJ held that there were no “legal ties of such a nature as might affect the application of Resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory.”<sup>96</sup> Although the ICJ did not take a position on the relationship between the right to self-determination and historic title, the individual opinions of the judges indicated a clear preference for the subordination of historic title to the right to self-determination.<sup>97</sup> In his separate opinion, Judge Dillard declared:

---

setting up an artificial State in the area of Southern Morocco which the colonialists call Mauritania.” *Id.* (citation omitted).

89. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (Jan. 26) [hereinafter *Namibia*]. After the First World War, Namibia, the former German South West Africa, was administered as a mandate by South Africa which refused to place the territory under a trusteeship after the Second World War. *See id.*

90. *Id.* at 31.

91. *See id.* at 74 (Amoun, J., separate opinion).

92. Laing, *supra* note 51, at 224.

93. *See* Isaac Dore et al., *Self-Determination: The Cases of Fiji, New Caledonia, Namibia, and the Western Sahara*, 82 AM. SOC’Y INT’L L. 429, 439 (1990) for a detailed outline of the facts of the case and developments after the ICJ’s Advisory Opinion.

94. *Western Sahara* (1975), 1975 I.C.J. 12, 14 (Oct. 16) [hereinafter *Western Sahara*].

95. *See generally id.*

96. *Id.* at 68.

97. MUSGRAVE, *supra* note 79, at 241. *See also* Laing, *supra* note 51, at 224.

[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people. Viewed in this perspective it becomes almost self-evident that the existence of ancient 'legal ties' of the kind described in the Opinion, while they may influence some of the projected procedures for decolonization, can have only a tangential effect in the ultimate choices available to the people.<sup>98</sup>

Some international legal scholars have also expressed the importance of the right of self-determination over historic claims, stating, for example, "[g]enerally, neighboring states have not been allowed to help themselves to adjacent territories on the basis of historical claims; boundary readjustments must come as an expression of the democratically expressed will of those subject to the readjustment."<sup>99</sup> Taking a different position "would lead to endless conflicts, as modern states [find] themselves under pressure to join a general reversionary march backward to a *status quo ante* of uncertain age and validity."<sup>100</sup>

The practices of the U.N. General Assembly indicate a willingness to support self-determination at the cost of historic title.<sup>101</sup> In the cases of West Irian, East Timor, and Belize, the U.N. General Assembly upheld the right to self-determination of the inhabitants of the territory over

98. *Western Sahara*, *supra* note 94, at 122 (Dillard, J., separate opinion). Judge Nagendra Singh stated:

the consultation of the people of the territory awaiting decolonization is an inescapable imperative whether the method followed on decolonization is integration or association or independence . . . . Thus even if integration of territory was demanded by an interested State, as in this case, it could not be had without ascertaining the freely expressed will of the people—the very *sine qua non* of all decolonization.

*Id.* at 81 (Singh, J., declaration). Likewise Judge De Castro argued that the ties of a claimant state to a former territory are subject to intertemporal changes in the law. Therefore, the current law relating to self-determination would supersede ties which may have existed under a previous regime of international law. *See id.* at 169 (De Castro, J., separate opinion). Under this current law "the administering Power . . . has a duty to recognize the principle that the interests of the inhabitants of the territory are paramount." *Id.*

99. Thomas M. Franck, *The Stealing of the Sahara*, 70 AM. J. INT'L L. 694, 697–98 (1976). *But cf.* Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal*, 16 CONN. J. INT'L L. 1, 19 (2000).

100. Franck, *supra* note 99, at 698. A contrary opinion is supported by J. Robert Maguire, who argues that, in appropriate circumstances, "a strong historical claim overrides the right of an indigenous population to self-determination even though the claim is centuries old." J. Robert Maguire, Note, *The Decolonization of Belize: Self-Determination v. Territorial Integrity*, 22 VA. J. INT'L L. 849, 871 (1982). Similarly, "[a] weak claim will not affect the right of self-determination no matter how recently the claim arose." *Id.* at 871–872. However, this argument seems to be incorrect because it is inconsistent with the actual case law.

101. *See* Blay, *supra* note 82, at 450.



claims of historic title and indicated that the wishes of the people take precedence in the disposition of their territories.<sup>102</sup>

#### 4. *Limits to the Principle of Self-Determination*

Over the years, the principle of self-determination has acquired different meanings and interpretations. Resolution 1514 (XV), the Declaration on Friendly Relations, and the two previously-discussed international Covenants all state that all peoples have the right to self-determination. However, nowhere is it defined what constitutes a “proper self-determining ‘unit’.”<sup>103</sup>

Traditionally, the right to self-determination of peoples exists in two parts:<sup>104</sup> 1) *internal* self-determination, which identifies “a people’s pursuit of its political, economic, social, and cultural development within the framework of an existing state;”<sup>105</sup> and, 2) *external* self-determination, which “entitles a people to decide its international identity and to be free from foreign interference.”<sup>106</sup> The meaning attributed to self-determination will in each case be determined by the identity of the “peoples” invoking the right.<sup>107</sup> In its first phase, between the World Wars, self-determination focused on legitimizing the break-up of empires and consequently vested in “ethnic communities, nations or nationalities primarily defined by language or culture.”<sup>108</sup> In the second phase, the post-Second World War phase, self-determination was characterized by its anti-colonialist interpretation.<sup>109</sup> And in the third phase, post-colonial phase, self-determination was interpreted as “a certain entitlement of segments of the population of independent, non-racist states.”<sup>110</sup> More recently, the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities has defined peoples with a claim to self-determination as “national or ethnic, religious and linguistic minorities.”<sup>111</sup>

---

102. *Id.*

103. Chen, *supra* note 3, at 1290.

104. Johan D. van der Vyver, *Self-Determination of the Peoples of Quebec Under International Law*, 10 J. TRANSNAT’L L. & POL’Y 1, 11–12 (2000); Kolodner, *supra* note 19, at 159.

105. Van der Vyver, *supra* note 104, at 11 (citation omitted).

106. Kolodner, *supra* note 19, at 159 (citation omitted).

107. Van der Vyver, *supra* note 104, at 14.

108. *See id.* at 15 (citation omitted).

109. *Id.* at 16. By extension, self-determination was held to apply to peoples subject to racist regimes. *See id.* South Africa claimed that the establishment of its tribal homelands as part of the apartheid regime constituted a manifestation of the right to self-determination of the different ethnic groups within the country’s population. *Id.* at 16–17. The international community responded that the tribal homelands did not emerge from the wishes of the people but were merely a creation of the white regime. *Id.* at 17.

110. *Id.* at 17.

111. G.A. Res. 47/135, art. 2, para. 1 (Dec. 18, 1992), available at <http://www.un.org/documents/ga/res/47/a47r135.htm> (last visited Oct. 23, 2002).

Thus, "[r]eligious, ethnic, and cultural minorities have come to be recognized in . . . international law as "peoples" [with] a right to self-determination."<sup>112</sup>

Four different components to self-determination can be distinguished depending on the identity of the "peoples" claiming self-determination. During the inter-war period, self-determination was used to disintegrate empires; "peoples" were seen as territoriality defined nations asserting political independence.<sup>113</sup> The definition shifted to colonized people asserting independence from colonial rule following the Second World War, and in the 1960s, a new category emerged: *peoples subject to racist regimes who were demanding participation in the government of their countries*.<sup>114</sup> Finally, the right to self-determination has extended to include national or ethnic, cultural, religious, and linguistic minorities who want to live according to the traditions and customs of their group.<sup>115</sup>

It should be noted that the right to self-determination does not include a right to secession. The claim to self-determination by one group necessarily conflicts with another group's claim to territorial integrity.<sup>116</sup> Although, as of yet, secession is not recognized as a right under international law, international law does not prohibit secession.<sup>117</sup> As stated in the Declaration on Friendly Relations, secession may be lawful if the decision is "freely determined by a people."<sup>118</sup> The existence of a new state will also be accepted if, as a consequence of an armed conflict, distinct territories of an existing state should agree to secede under the terms of a peace treaty.<sup>119</sup> Gerry Simpson claims that "[r]ecent developments lend credence to the idea that a new post-colonial right to limited secession may be on the point of crystallizing."<sup>120</sup>

---

112. Van der Vyver, *supra* note 104, at 14. See also Kelly, *supra* note 8, at 218.

113. Van der Vyver, *supra* note 104, at 21.

114. *Id.*

115. *Id.*

116. See Hannum, *supra* note 25, at 41.

117. *Id.* at 42. See also Frederic L. Kirgis, Jr., Comment, *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L. L. 304, 307 (1994).

118. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 123-24, U.N. Doc A/8028 (1970). Examples are the reunification of Germany, and the disintegration of both the Soviet Union and Czechoslovakia. See van der Vyver, *supra* note 104, at 26.

119. Van der Vyver, *supra* note 104, at 26; CASSESE, *supra* note 27, at 359-63. An example of this rule is the secession of Eritrea from Ethiopia. Van der Vyver, *supra* note 104, at 26.

120. Simpson, *supra* note 6, at 284. Simpson refers to the U.N. sanctioned intervention on behalf of the Kurds in May 1991. This humanitarian intervention was justified on the grounds that the Kurds in Northern Iraq were suffering massive human rights

The concept of self-determination has been in constant evolution throughout its history. That the principle of self-determination does not yet recognize a right to secession, except in the two extreme circumstances mentioned above, anticipates another change in its definition.<sup>121</sup>

### C. *Microstates*

The acceleration of decolonization after the Second World War resulted in the emergence of numerous microstates.<sup>122</sup> This trend caused international concern about the viability and desirability of these new microstates.<sup>123</sup> Microstates are defined as "exceptionally small nations whose 'independence' is generally acknowledged, although it is in fact seriously limited by the political and economic facts of international life."<sup>124</sup> Hector Gross Espiell, a Special Rapporteur for the U.N. Commission on Human Rights, found that diminutiveness itself does not prevent self-determination of these small states, but that several other factors had to be taken into account as well.<sup>125</sup> These factors include: 1) the possibility that these small states might succumb to external influence; 2) that resource-poor States could not discharge their U.N. duties; and, 3) the fragmentation into small nations could endanger stability in the international community.<sup>126</sup> These international concerns about the emergence of microstates stem from the debate over admission of the Maldives to the United Nations in 1965.<sup>127</sup> As a consequence, a U.N. Committee was established in 1969 to investigate the possibility of alternative membership for very small countries.<sup>128</sup> Although this Committee produced an Interim Report in June 1970, no official action was ever taken to establish a special membership category.<sup>129</sup>

---

deprivations causing a flood of refugees into Turkey. This threat to the Kurds' peace will remain as long as they are denied their self-determination. *Id.*

121. See Hannum, *supra* note 25, at 67.

122. Chen, *supra* note 3, at 1292.

123. *Id.*

124. Daniel Orlow, Comment, *Of Nations Small: The Small State in International Law*, 9 TEMP. INT'L & COMP. L.J. 115, 119 (1995) (quoting PATRICIA WOHLGEMUTH BLAIR, *THE MINISTATE DILEMMA* 2 (1967)).

125. See Thomas D. Grant, *Between Diversity and Disorder: A Review of Jorri C. Duursma, Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood*, 12 AM. U. J. INT'L L. & POL'Y 629, 633 (1997) (book review).

126. *Id.*

127. *Id.* at 656.

128. *Id.* at 657.

129. *Id.* However, the Educational, Scientific and Cultural Organization (UNESCO) and the Food and Agricultural Organization (FAO) amended their constitutions to admit non-self-governing territories. In the 1990s, seven small entities were admitted membership to the United Nations: Liechtenstein (Sept. 18, 1990), Micronesia (Sept. 17, 1991), the Marshall Islands (Sept. 17, 1991), San Marino (Mar. 2, 1992), Monaco (May 28, 1993), Andorra (July 28, 1993), and Palau (Dec. 15, 1994). *Id.*

Even if microstates represent the culmination of the right to self-determination, they practically cannot survive unless they are economically viable.<sup>130</sup> "A state without a basis for a sustainable economy cannot long exist."<sup>131</sup> This concern was originally expressed by United States U.N. Ambassador Goldberg in 1966 when he said: "[i]t was not anticipated, nor do I believe, would it have been accepted in 1945 that the United Nations be extended to include tiny states whose only justification for existence is that their territory is no longer wanted by the colonial governments that for years supported them."<sup>132</sup> Microstates, therefore, became seen as "merely a logical and unavoidable result of a long evolution."<sup>133</sup>

#### *D. Future Trends*

##### *1. The Demise of the Principle of Self-Determination?*

Some commentators have asserted that because the era of decolonization has come to an end, the principle of self-determination has outlived its usefulness and should be relocated to the historical dustbin.<sup>134</sup> They claim that support for these self-determination movements will lead to violent conflicts that will threaten the stability of a region or even the entire world community.<sup>135</sup>

According to Eric Kolodner, such perspective is misguided for two reasons: 1) it ignores the legitimate human rights claims of people; and, 2) it perpetuates domestic and international conflict.<sup>136</sup> Although the era of decolonization has officially ended, many peoples still are suppressed under neo-colonial rule.<sup>137</sup> Only the international community's support for their self-determination claims can guarantee human rights and

---

130. See Kelly, *supra* note 8, at 274.

131. *Id.* A recent example would be the case of the Republic of Nagorno-Karabakh. Without any viable economy, the only thing holding the self-styled republic together is the shared ethnicity of the Armenian people. *Id.*

132. Orlow, *supra* note 124, at 125 (citation omitted).

133. *Id.* (citation omitted).

134. Kolodner, *supra* note 19, at 153-54. See generally Amitai Etzioni, *The Evils of Self-Determination*, 89 FOREIGN POL'Y 21 (1992).

135. See Etzioni, *supra* note 134, at 21.

136. Kolodner, *supra* note 19, at 157.

137. See Chen, *supra* note 3, at 1296. Those currently claiming self-determination include Palestinians, Kurds, Tamils, Tibetans, the Scots, Roman Catholics in Northern Ireland, Catalans and Basques in Spain, and the French Canadians in Quebec. See *id.*

dignity for these peoples.<sup>138</sup> Furthermore, the serious consequences of the international community's failure to support claims for self-determination are clearly demonstrated in Somalia and in the former Yugoslavia. Therefore, Kolodner argues for a readjustment of the content of the principle of self-determination by the international community in order to address the changing needs of a post-Cold War world rather than abandoning the principle altogether.<sup>139</sup>

## 2. *Self-Determination as Customary Law*

Over the years, self-determination has attained the status of a "right" through customary international law.<sup>140</sup> The only documents that refer to self-determination as a right and create legally binding obligations are the U.N. Charter, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.<sup>141</sup> These documents act as sources of positive law under Article 38(1)(a) of the ICJ Statute.<sup>142</sup> However, because these treaties do not define the concept of self-determination, no legal obligation exists.<sup>143</sup> Individual U.N. General Assembly resolutions defining the content of self-determination carry only moral force and do not generate legally binding obligations.<sup>144</sup>

---

138. See generally *id.* at 1295–96.

139. Kolodner, *supra* note 19, at 154. Some eloquent political commentators, such as William Safire, even endorsed the evolution of a right to self-determination for ethnically repressed peoples:

The Clinton Administration, facing the prospect of television coverage of tens of thousands of freezing [Kosovar] refugees, will ultimately [act militarily] . . . . That's what happened after "our" victory over Saddam Hussein. Only when we saw the televised human tragedy of the Kurdish people . . . did we create a sanctuary for them in northern Iraq . . . , limiting Iraq's sovereignty in that "no-flight zone."

Thus, . . . a new policy is being backed into by the Western world: if enough civilian lives are in danger of starvation or massacre, and if intervention by airpower can make a difference and if the U.S. takes the lead then an alliance of nations will reluctantly act to impose a temporary, *de facto* self-determination.

. . . .

Needed now is a new policy of evolutionary self-determination that time can advance or modify. Some leader must formulate and sell a new form of shared sovereignty, a *tertium quid* to accommodate insurgencies and defuse ethnic conflict not just in Kosovo, but in other lands where there can be no clear winner—from Iraq to East Timor and the West Bank.

History awaits that newly practical and more sophisticated Wilson . . . .

William Safire, *Woodrow Wilson Lives*, N.Y. TIMES, Sept. 28, 1998, at A17.

140. See Benedict Kingsbury, *Self-Determination and "Indigenous Peoples"*, 86 AM. SOC'Y INT'L L. 369, 383 (1992).

141. See Hanauer, *supra* note 2, at 151.

142. *Id.*

143. See *id.* at 151–52.

144. See U.N. CHARTER art. 10.

Collectively viewed, these instruments, together with years of evolving state practice, have created a set of norms regarding the principle of self-determination, which have achieved the status of customary international law as defined by Article 38(1)(b) of the ICJ Statute as a "general practice accepted by law."<sup>145</sup> Consequently, in its Advisory Opinion in *Namibia*, the ICJ declared that Resolutions 1514, 1541, 2625, and others representing "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them."<sup>146</sup> Unanimously adopted, Resolution 1514 (XV) makes the strongest contribution that self-determination has become part of international customary law.<sup>147</sup>

The right to self-determination has been supported by state practice; over seventy territories and former colonies have been decolonized since 1946, with many of them becoming sovereign states and members of the United Nations.<sup>148</sup> Furthermore, governments and international scholars accept the right of peoples to self-determination.<sup>149</sup> And although it is debatable whether self-determination has become a *jus cogens*, it has undoubtedly achieved the status of customary international law.<sup>150</sup>

---

145. Hanauer, *supra* note 2, at 152. See also Kirgis, *supra* note 117, at 305; Shaw, *supra* note 29, at 175; Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21, 26 (1992).

146. *Namibia*, *supra* note 89, at 31. Justice Dillard reiterated this sentiment in *Western Sahara* stating:

the cumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time may give rise to a general *opinio juris* and thus constitute a norm of customary international law . . . . [T]his is the precise situation manifested by the long list of resolutions which, following in the wake of resolution 1514 (XV), have proclaimed the principle of self-determination to be an operative right in the decolonization of non-self governing territories.

*Western Sahara*, *supra* note 94, at 121 (Dillard, J., separate opinion).

147. See Hanauer, *supra* note 2, at 153. The U.N. Office of Legal Affairs has stated: in view of the greater solemnity and significance of a declaration, it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.

*Id.* (citation omitted).

148. *Id.*

149. See Hannum, *supra* note 25, at 31.

150. *Id.*

### 3. *Self-Determination as a Right to a Democratic Form of Government*

Thomas Franck alleges that there is a “transformation of the democratic entitlement from moral prescription to international legal obligation”<sup>151</sup> and that self-determination can be achieved through this evolving right to a democratic government.<sup>152</sup> However, it is doubtful that a democratic government alone can satisfy minorities’ urges for self-determination, let alone preserve their cultural identities.<sup>153</sup>

## III. THE CASE OF GIBRALTAR

### A. *Introduction*

For nearly 300 years Great Britain has ruled Gibraltar using it as a symbol of its naval strength.<sup>154</sup> Prior to British rule, sovereignty over Gibraltar alternated between the Moors and the Spaniards, with Spain finally controlling the territory from 1462 to 1704.<sup>155</sup> After the British invaded in 1704, sovereignty over Gibraltar was transferred to Britain by the Treaty of Peace and Friendship signed between Great Britain and Spain (Treaty of Utrecht) in 1713.<sup>156</sup>

Gibraltar is a narrow peninsula off Spain’s southern Mediterranean coast, just northeast of the Strait of Gibraltar. Connected to the Spanish mainland by a sandy isthmus, it is three miles long and three-fourths of a mile wide.<sup>157</sup> Its name is derived from Jabal Tariq in Arabic, after Tariq ibn Ziyad, who captured the peninsula in 711 A.D.;<sup>158</sup> together with Mount Hacho, on the African coast opposite, it is one of the Pillars of Hercules,<sup>159</sup> which identified the western limits of navigation for the ancient world.<sup>160</sup> Commonly referred to as “the Rock”, Gibraltar has personified the British naval strength since the eighteenth century.<sup>161</sup> Most of its inhabitants are of mixed Genoese, British, Spanish, Maltese, and Portuguese descent, and only Gibraltarians are allowed to live on the

---

151. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 47 (1992).

152. Simpson, *supra* note 6, at 279.

153. *See id.* at 279–80.

154. *See Gibraltar*, 5 THE NEW ENCYCLOPEDIA BRITANNICA 253 (15th ed. 1998). *See also* KEYLOR, *supra* note 26, at 9.

155. Simon J. Lincoln, Note, *The Legal Status of Gibraltar: Whose Rock is it Anyway?*, 18 FORDHAM INT’L L.J. 285, 286 (1994).

156. *Id.*

157. *Gibraltar*, *supra* note 154, at 253.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

Rock, all others must acquire residence permits.<sup>162</sup> Although the Rock is “physically Mediterranean, with . . . pavement cafes and summer heat, . . . the trappings of genteel Britishness are everywhere.”<sup>163</sup> Basing its claim on its right to territorial integrity, Spain is demanding the return of the peninsula, whereas, Great Britain insists that the Treaty of Utrecht instituted British sovereignty over Gibraltar thereby ceasing all Spanish claims.<sup>164</sup>

## *B. History of the Anglo-Spanish Dispute*

### *1. Pre-1713*

Under the direction of Tariq ibn Zeyad, the Moors conquered the peninsula in 711 A.D., which was thereafter held as a fortress by successive Muslim rulers until 1462, when Gibraltar was annexed to the Spanish Kingdom of Castille.<sup>165</sup> The Rock “remained under Spanish control until a joint Anglo-Dutch fleet seized the town during the War of the Spanish Succession.”<sup>166</sup> To show their support of the newly crowned Spanish king—King Philip V—most of the inhabitants walked out of Gibraltar and settled in the neighboring town of San Roque.<sup>167</sup> Hostilities between Great Britain and Spain ended with the peace treaty signed in the Dutch town of Utrecht on July 13, 1713.

### *2. Treaty of Utrecht—1713*

Article X of the Treaty of Utrecht declared that the Spanish king would “yield to the crown of Great Britain the full and entire propriety of the town and the castle of Gibraltar, together with the port,

---

162. *Id.*

163. Justin Webb, *Gibraltar eyes uncertain future*, BBC NEWS, Nov. 20, 2001, at [http://www.news.bbc.co.uk/2/hi/world/from\\_our\\_own\\_correspondent/1657790.stm](http://www.news.bbc.co.uk/2/hi/world/from_our_own_correspondent/1657790.stm) 9last visited Sept. 30, 2002). “The road signs, the bobbies on the beat, the Marks and Spencers, the gentle tolling of the church bells, the ringing tones of the telephones, the fact that everyone wears knee breeches and morris dancing is compulsory on Tuesdays. Yes, I made those last bits up. But only just.” *Id.*

164. See Lincoln, *supra* note 155, at 286–87.

165. *Gibraltar*, *supra* note 154, at 253; Lincoln, *supra* note 155, at 291.

166. Lincoln, *supra* note 155, at 291. In 1701, after the crowning of Philip of Anjou, grandson of King Louis XIV of France, as Philip V, King of Spain, the British feared that he might form an alliance between France and Spain. *Id.* at 291 n.44. At the time, Archduke Charles of Austria, the son of the Holy Roman Emperor Leopold I, also made a claim for the Spanish throne. *Id.* “The War of the Spanish Succession [started] when Great Britain declared war against France and Spain on May 4, 1702.” *Id.* at 292 n.44.

167. *Id.* at 292.



fortifications, and forts thereunto belonging[.]”<sup>168</sup> This same first paragraph further stipulates that Spain “gives up said propriety to be held and enjoyed absolutely with all manner of right for ever, without any exception or impediment whatsoever.”<sup>169</sup> In exchange for this propriety, Great Britain promised in the final paragraph of Article X if it decided to alienate Gibraltar, “the preference of having the same shall always be given to the crown of Spain before any others.”<sup>170</sup> Although both parties signed the peace treaty, they were soon at odds as to the interpretation of the term “propriety.”<sup>171</sup> According to the British, the term referred to the land and everything on the land within the city and fortifications of Gibraltar.<sup>172</sup> Under Spanish civil law, a propriety merely gives its owner something similar to a right of possession but does not bestow any full sovereign rights.<sup>173</sup>

### 3. *Post-1713*

#### a. *The Committee of Twenty-Four*

Because Great Britain registered Gibraltar as a non-self-governing territory under the provisions of Chapter XI of the U.N. Charter, it is obliged to provide the United Nations with annual reports on the colony.<sup>174</sup> Created by the General Assembly in 1963, the Committee of Twenty-Four was charged with monitoring the implementation of Resolution 1514 (XV), which outlined the principles under which colonial powers were to free their colonies from colonial rule.<sup>175</sup> As Gibraltar is considered a British colony, Spain requested the Committee of Twenty-Four to analyze the Gibraltar situation under the terms of Resolution 1514 (XV) in 1963.<sup>176</sup> Its investigation took two years during which Spanish, British, and Gibraltarian delegations were heard, and a consensus was reached which structured negotiations for the future status of Gibraltar.<sup>177</sup> This consensus was silent as to Gibraltar’s right to self-determination and only requested both parties to bear in mind the interests of the people of Gibraltar.<sup>178</sup>

---

168. Treaty of Peace and Friendship between Great Britain and Spain, July 13, 1713, Gr. Brit.-Spain, 28 CONSOL. T.S. 295, 330 [hereinafter Treaty of Utrecht].

169. *Id.* at 331.

170. *Id.*

171. See Lincoln, *supra* note 155, at 293–94.

172. *Id.* at 292 n.50.

173. *Id.*

174. U.N. CHARTER art. 73(e).

175. See discussion *supra* Part II.B.1.b

176. See Lincoln, *supra* note 155, at 294–95.

177. *Id.* at 295.

178. *Id.* at 295–96.

*b. Resolutions 2231 & 2353*

In 1966, the U.N. General Assembly passed Resolution 2231, which called upon both Spain and Great Britain to negotiate the future status of Gibraltar and to report back to the Committee of Twenty-Four.<sup>179</sup> Great Britain, acting in accordance with what it believed its responsibilities were under Resolution 2231, held a referendum in Gibraltar enabling the people to decide whether to join Spain or to retain their links to Britain.<sup>180</sup> The referendum, which took place on September 10, 1967, showed an overwhelming support for Britain—out of 12,182 votes cast, 12,138 supported British rule, whereas a mere forty-four voted in support for annexation to Spain.<sup>181</sup> In response to the results of the referendum, Great Britain adopted the Gibraltar Constitution, which “effectively gave the people of Gibraltar the power to veto any decision regarding the transfer of sovereignty from the British Crown to another state.”<sup>182</sup> However, on September 1, 1967, prior to the referendum, the Committee of Twenty-Four stated that the referendum would contradict the provisions of Resolution 2231; a position adopted by the U.N. General Assembly three months later.<sup>183</sup>

Resolution 2353, adopted by the U.N. General Assembly in December 1967, as a response to the invalid plebiscite, resolutely subordinated the claim to self-determination to the territorial claim of Spain.<sup>184</sup> Because

179. *Id.* at 296.

180. See Franck & Hoffman, *supra* note 85, at 373. Prior to holding its referendum, Britain informed Spain that it had given independence to 700 million people in the past twenty years, while Spain had maintained its colonies; and, Britain would apply the same principles as it has applied in its other decolonizations. *Id.* at 372.

181. *Id.* at 373. Commonwealth advisors, at the invitation of the British government, stated that they were impressed with the fair and proper manner the secret ballot process was conducted. *Id.*

182. Lincoln, *supra* note 155, at 297–98. The preamble of the Gibraltar Constitution reads as follows:

Whereas Gibraltar is part of Her majesty's dominions and Her Majesty's Government have given assurances to the people of Gibraltar that Gibraltar will remain part of Her Majesty's dominions unless and until an Act of Parliament otherwise provides and furthermore that Her Majesty's Government will never enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another state against their freely and democratically expressed wishes.

GIB. CONST. pmb1.

183. See *History*, at [http://www.gibraltar.gov.gi/political\\_development/pol\\_dev\\_index.htm](http://www.gibraltar.gov.gi/political_development/pol_dev_index.htm) (last visited Sept. 30, 2002).

184. See MUSGRAVE, *supra* note 79, at 247. “[T]he General Assembly [noted] that 250 years of [in]habitation was insufficient to establish the indigenous character of [Gibraltar’s] inhabitants.” *Id.* at 251.

in its preamble Resolution 2353 applied paragraph 6 of Resolution 1514 to Gibraltar, the U.N. General Assembly for the first time declared that consulting the people of a territory about their own wishes violates paragraph 6.<sup>185</sup> In response to the referendum and the adoption of the Gibraltar Constitution, the Spanish Government imposed a virtual complete ban on movement of persons and goods between Gibraltar and the Spanish mainland in June 1969.<sup>186</sup>

*c. Anglo-Spanish Agreements to Negotiate Sovereignty Issues*

To resolve their dispute over Gibraltar, Spain and Great Britain signed the Lisbon Agreement on April 10, 1980, stipulating that negotiations between both parties will be pursued in accordance with the relevant U.N. resolutions.<sup>187</sup> On November 1987, these negotiations resulted in the Brussels Agreement, which declared that to achieve implementation of the Lisbon Agreement, an open border between Spain and Gibraltar would be established and further negotiations on the issue of sovereignty would be held.<sup>188</sup>

Ten years after the Brussels Agreement was signed, Spain submitted a proposal to institute joint sovereignty over Gibraltar for at least fifty years between Spain and Great Britain, followed by autonomy within the Spanish kingdom.<sup>189</sup> This proposal was rejected by Great Britain and talks were broken off. Beginning in 2001, both parties agreed to another round of negotiations with a final agreement by May 19, 2002.<sup>190</sup>

---

185. Franck & Hoffman, *supra* note 85, at 374. See also MUSGRAVE, *supra* note 79, at 247; HARRIS, *supra* note 53, at 124.

186. Lincoln, *supra* note 155, at 298; Franck & Hoffman, *supra* note 85, at 374.

187. Lincoln, *supra* note 155, at 299.

188. *Id.* at 300.

189. *Spain and Britain agree Gibraltar talks*, BBC NEWS, July 26, 2001, at <http://news.bbc.co.uk/1/hi/world/europe/1457652.stm> (last visited Sept. 26, 2002).

190. *Id.* However, this date may have been delayed due to a supposedly secret report that was recently published. See Chris Hastings & David Bamber, *Gibraltar Faced Secret Handover Under Heath*, SUNDAY TELEGRAPH, Apr. 14, 2002, at 13. This report states that "Britain secretly planned to hand over Gibraltar to Spain [in 1971] because it was an 'extinct volcano' inhabited by 'arrogant and unrealistic' people." *Id.* The Foreign Secretary's proposal entailed giving sovereignty to Spain in exchange for a 999-year lease. Foreign Office papers also show that officials considered a compromise of handing the isthmus to the Catholic Order of Malta under a lease agreement. See *id.* Sir John Russell, the ambassador to Spain in 1971, noted that "[t]he order would allow the citizens to be British or Spanish as they wished. We would take a long lease on whatever we need. And there might be a provision for an eventual reversion to Spain." *Id.* The order, known as the Military Hospitaller Order of St John of Jerusalem of Rhodes and of Malta, is a humanitarian group with its own constitution, passports, stamps and diplomatic relations with ninety countries. See *id.* "One Foreign Office official seems to have been less than impressed, however. In a note attached to Sir John's original letter he wrote: 'I don't know if Sir J.R. has ever seen the order collectively assembled. I have. I would rather entrust Gibraltar to the 'Young Liberals'.'" *Id.*

*C. Views of the Parties*

Both Spain and Great Britain refer to the Treaty of Utrecht and the concept of self-determination to support their respective arguments regarding the Gibraltar issue. Spain is against Gibraltar's right for self-determination and is instead committed to the return of Gibraltar to Spain, thereby insuring Spanish territorial integrity.<sup>191</sup> Great Britain, on the other hand, while trying to support the interests of the Gibraltarians, is anxious to reduce tensions between the two countries to come to a better cooperation with Spain within the European Union.<sup>192</sup> However, a new player has recently entered the dispute—the people of Gibraltar who claim the right to self-determination.<sup>193</sup>

*1. Spain*

Over the past 300 years, the Spanish position has changed little. Since the signing of the Treaty of Utrecht, Spain has interpreted the Treaty of Utrecht as transferring something akin to possession rather than sovereignty over the Rock.<sup>194</sup> Moreover, Spain has firmly embraced the application of Resolution 1514 (XV) concerning territorial integrity by claiming that its right to territorial unification supersedes Gibraltar's right to self-determination.<sup>195</sup>

*a. Interpretation of the Treaty of Utrecht*

For almost three centuries, Spain has claimed that the Treaty of Utrecht only recognized British possession and not sovereignty.<sup>196</sup> But even if the word "propriety" should include sovereignty, Spain argues, then this should be limited in its scope.<sup>197</sup> "The Spanish contend that the Treaty grants Great Britain a 'propriety' but 'without territorial jurisdiction.'"<sup>198</sup> This construction would aid Spain in retaining sovereignty.<sup>199</sup>

---

191. Lincoln, *supra* note 155, at 306; Franck & Hoffman, *supra* note 85, at 375–76.

192. Lincoln, *supra* note 155, at 306.

193. See generally J.J. Bossano, *The Decolonization of Gibraltar*, 18 FORDHAM INT'L L.J. 1641 (1995).

194. Lincoln, *supra* note 155, at 307; MUSGRAVE, *supra* note 79, at 246.

195. MUSGRAVE, *supra* note 79, at 246.

196. See *id.*

197. Lincoln, *supra* note 155, at 307.

198. *Id.*

199. *Id.* at 307–08.

Although Spain interprets the definition of “propriety”, it uses the literal meaning of the Treaty of Utrecht to insist that the cession of land to Great Britain does not include the isthmus, but instead is limited to the walls and fortifications of the city of Gibraltar.<sup>200</sup> During the negotiations that led to the Treaty of Utrecht, British negotiators proposed the cession of the island in accordance with the cannon shot rule,<sup>201</sup> which Spain claims was opposed by its negotiators.<sup>202</sup>

*b. The Right for Territorial Integrity*

To use Resolution 1514 (XV) in its favor, Spain applied Resolution 1541 to the Gibraltar issue.<sup>203</sup> Resolution 1541 presents a two-part test to determine whether a territory is considered a non-self-governing territory and therefore eligible for decolonization under Resolution 1514.<sup>204</sup> First, the territory must be geographically distinct from the colonial power; second, the territory must be distinct ethnically and/or culturally from the colonizer.<sup>205</sup> Based on those two requirements, Spain argues that the inhabitants of the Rock are geographically, culturally, and economically more closely related to Spain than to Great Britain and thus, Resolution 1514 (XV) should apply.<sup>206</sup>

During the meetings of the Committee of Twenty-Four, Spain argued that Spain and Gibraltar were not only geographically connected, but also economically and demographically connected.<sup>207</sup> Spain claims that Gibraltarians cannot be defined as a “people” under Resolution 1514 (XV) because the present population of the Rock was prefabricated to facilitate British rule after the original inhabitants were expelled.<sup>208</sup> Therefore, Gibraltarians should not be granted the right to self-determination under Resolution 1514 (XV), and instead Spain’s territorial rights should take precedence.

---

200. *Id.* at 308.

201. *Id.* “The cannon shot rule held . . . that a sovereign could exercise authority over the sea that [lies] within a cannon’s range from the shore.” *Id.* at 308 n.161 (citation omitted).

202. *Id.* at 308.

203. Lincoln, *supra* note 155, at 308–09.

204. *Id.* See also G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4651 (1960).

205. See Lincoln, *supra* note 155, at 309. See also G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4651 (1960).

206. See Lincoln, *supra* note 155, at 309.

207. *Id.* at 310. Spain even claimed that Gibraltar, in connection to being part of mainland Spain, actually lived at its expense through Gibraltar’s vast smuggling operations. *Id.*

208. See MUSGRAVE, *supra* note 79, at 246.

c. *British Acts Granting Sovereignty to Gibraltar is a Breach of the Treaty of Utrecht*

Spain further contends that certain British acts regarding the isthmus have breached the provisions of the Treaty of Utrecht. According to Spain, the Gibraltar Constitution amounts to a breach of the pre-emption clause, stipulated in the final paragraph of Article X of the Treaty of Utrecht.<sup>209</sup> This clause prohibits Great Britain from transferring sovereignty to any other entity unless it is first offered to Spain.<sup>210</sup> Spain claims that this prevents Great Britain from awarding the right of self-determination to the Gibraltarians.<sup>211</sup>

2. *Great Britain*

Since the signing of the Treaty in 1713, the British have insisted that they were granted sovereignty not only over the city of Gibraltar but also over the entire isthmus.<sup>212</sup> After the intervention of the United Nations in the dispute, Great Britain has consistently supported the right of the people of Gibraltar to choose between Spanish or British rule and has been increasingly willing to transfer most of its power over Gibraltar to the Gibraltarian government.<sup>213</sup>

a. *Cession to the Crown*

The British contend that Gibraltar became a British possession through conquest in 1704.<sup>214</sup> Thereafter, the town and castle of Gibraltar were ceded to Great Britain by the Treaty of Utrecht.<sup>215</sup> In international law, cession involves the formal transfer of title and rights over territory

---

209. See Lincoln, *supra* note 155, at 311; CASSESSE, *supra* note 27, at 209. This last paragraph of Article X of the treaty states:

[a]nd in case it shall hereafter seem meet to the crown of Great Britain to grant, sell or by any means to alienate therefrom the propriety of the said town of Gibraltar, it is hereby agreed and concluded that the preference of having the same shall always be given to the crown of Spain before any others.

Treaty of Utrecht, *supra* note 168, at 331.

210. See Treaty of Utrecht, *supra* note 168, at 331.

211. Lincoln, *supra* note 155, at 311.

212. *Id.* at 313; CASSESSE, *supra* note 27, at 209.

213. CASSESSE, *supra* note 27, at 209.

214. Franck & Hoffman, *supra* note 85, at 375.

215. *Id.*

from one state to another.<sup>216</sup> Usually, the two states transfer the territory via a treaty that defines the land and the rights attached to it.<sup>217</sup>

Thus, Great Britain argues that the first sentence of Article X of the Treaty grants sovereignty “forever” and “without any exception or impediment whatsoever.”<sup>218</sup> Great Britain further insists that at no time during the negotiations prior to the Treaty of Utrecht did the Spanish diplomats indicate that Great Britain was to get anything less than full sovereignty over the isthmus.<sup>219</sup> Moreover, by using the cannon shot rule, the Treaty of Utrecht implicitly awards more territory to Britain than explicitly defined in it. While one official claimed that the isthmus was to be considered as part of the fortifications of Gibraltar, the British Ambassador to Spain, William Stanhope, suggested the cannon shot principle as the justification for the extra land.<sup>220</sup>

#### *b. Self-Determination*

Throughout the debates in the Committee of Twenty-Four and the votes on Resolution 2231, the idea that the people of Gibraltar are the only ones that can decide their future guided the British delegation.<sup>221</sup> However, hesitant to breach the reversionary provision of the Treaty of Utrecht, the British have given no indication that they support Gibraltar’s right to self-determination if this would lead to independent statehood.<sup>222</sup>

---

216. See Brian N. Mueller, Note, *The Falkland Islands: Will the Real Owner Please Stand Up*, 58 NOTRE DAME L. REV. 616, 625 (1983).

217. See *id.*; Lee, *supra* note 99, at 8–9. Because cession involves transfer of title, the acquiring state gets a derivative title. Mueller, *supra* note 216, at 625.

218. Lincoln, *supra* note 155, at 313. The first sentence of Article X of the Treaty of Utrecht states:

[t]he Catholic King does hereby, for himself, his heirs and successors, yield to the crown of Great Britain the full and entire propriety of the town and castle of Gibraltar, together with the port, fortifications, and forts thereunto belonging; and he gives up the said propriety to be held and enjoyed absolutely with all manner of right for ever, without any exception or impediment whatsoever.

Treaty of Utrecht, *supra* note 172, at 330.

219. Lincoln, *supra* note 155, at 314. Great Britain claims that the Royal Navy’s conquest of the city of Gibraltar took sovereignty away from King Philip V. *Id.*

220. *Id.* at 315. “[W]hen a town is yielded there is tacitly yielded at the same time, all the ground commanded by its artillery, since otherwise the cession would be of little use.” Letter from William Stanhope, British minister in Madrid to the Spanish Secretary of State, Marques the Grimaldo, Aug. 19, 1723, *quoted in* Lincoln, *supra* note 155, at 315 n.215.

221. Lincoln, *supra* note 155, at 315.

222. *Id.* at 317.

*c. British Actions in Light of Resolution 2231 and  
the Treaty of Utrecht*

In accordance with Article 73 of the U.N. Charter, the British recognize that the "interests of the inhabitants of these territories are paramount" and to that end "take due account of the political aspirations of the people."<sup>223</sup> Paragraph 2 of Resolution 1514 (XV) reiterates this principle by stipulating that all people can freely determine their own political status.<sup>224</sup> Great Britain insists that the 1967 Gibraltar plebiscite must be interpreted in the light of Resolution 1514 (XV).<sup>225</sup> The overwhelming support in the referendum for maintaining British rule in the island left no doubt as to the will of the Gibraltarians and encouraged Britain to execute the Gibraltar Constitution.<sup>226</sup>

The British maintain that modification of their existing relationship with Gibraltar is consistent with the Treaty of Utrecht.<sup>227</sup> However, Great Britain will not grant complete independence to the people of Gibraltar so as not to break the preemption clause of the Treaty of Utrecht.<sup>228</sup>

### *3. Gibraltar*

Over the last couple of years, the people of Gibraltar have become dissatisfied with British rule and have increasingly pursued a claim for self-determination.<sup>229</sup> The Gibraltarians maintain that Resolution 2734 establishes that the principles embodied in the U.N. Charter supersede obligations under any other international agreement.<sup>230</sup> Therefore, the

223. See U.N. CHARTER art. 73.

224. See discussion *supra* Part II.B.1.

225. See Franck & Hoffman, *supra* note 85, at 375.

226. Lincoln, *supra* note 155, at 316.

227. *Id.* at 317.

228. *Id.*

229. See *id.* at 318.

230. *Id.* at 322. The relevant text of Resolution 2734 reads as follows:

The General Assembly . . .

1. Solemnly reaffirms the universal and unconditional validity of the purposes and principles of the Charter of the United Nations as the basis of relations among States irrespective of their size, geographical location, level of development or political, economic and social systems and declares that the breach of these principles cannot be justified in any circumstances whatsoever;
2. Calls upon all States to adhere strictly in their international relations to the purposes and principles of the Charter, including . . . the principle of equal rights and self-determination of peoples . . . ;



right to self-determination should take precedence over the older obligations established by the Treaty of Utrecht in 1713.<sup>231</sup>

Recently, Gibraltar declined the invitation to take part in the new round of negotiations between Britain and Spain, unless it was given a veto over its future status.<sup>232</sup> This demand was rejected by Spain who insisted that “[t]he people of Gibraltar cannot have the right of veto over matters being discussed by two sovereign states.”<sup>233</sup> Gibraltar justified its demand for a veto by claiming that Great Britain was planning to share sovereignty over the Rock with Spain, even if Gibraltar later rejected shared sovereignty in a referendum;<sup>234</sup> under the Gibraltar Constitution, any agreement reached between Great Britain and Spain would have to be approved in a referendum by the people of Gibraltar.<sup>235</sup> An agreement between Great Britain and Spain over Gibraltar would, however, open the way for the creation of an Anglo-Spanish alliance within the European Union, which would counterbalance the existing Franco-German alliance.<sup>236</sup>

#### *D. Is the Principle of Self-Determination Applicable to Gibraltar?*

##### *1. Spain's Misguided Claims to Gibraltar*

Spain has consistently argued that the case of Gibraltar should not be decided based on the wishes of its inhabitants but solely on the principle of territorial integrity as stipulated in paragraph 6 of Resolution 1514 (XV).<sup>237</sup> Based on this principle and the reversionary provision of the Treaty of Utrecht, Spain demands the return of the territory from which it was separated in 1713, having annexed it in 1501.<sup>238</sup>

- 
3. *Solemnly reaffirms* that, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.

G.A. Res. 2734, U.N. GAOR, 25th Sess., Supp. No. 28, at 22, U.N. Doc. A/8082 (1970).

231. See Bossano, *supra* note 193, at 1642.

232. See *Gibraltar demands veto on future status*, BBC NEWS, Oct. 31, 2001, at <http://news.bbc.co.uk/1/hi/world/europe/1630056.stm> (last visited Sept. 26, 2002).

233. *Id.* (quoting Josep Pique, Spanish Foreign Minister).

234. Gethin Chamberlain, *Gibraltarians remain rock solid as 30,000 protest against Spanish control*, THE SCOTSMAN, Mar. 19, 2002, available at <http://www.thescotsman.co.uk/index.cfm?id=301552002> (last visited Dec. 29, 2002).

235. *Cf. id.*

236. See *id.*

237. Bossano, *supra* note 193, at 1642.

238. *Id.*

Both Lincoln and Bossano claim that this reversionary principle is anachronistic to the principles established by the U.N. Charter.<sup>239</sup> Both Spain and Great Britain have followed the Treaty of Utrecht only when it is convenient for them to do so. One treaty stipulation prevented the British from granting Jews and Moors the right to reside in the isthmus,<sup>240</sup> but Great Britain failed to comply, allowing both Jews and Moors to settle on the island.<sup>241</sup> Another provision prohibited Gibraltar's "open communication" with the Campo area.<sup>242</sup> Originally intended to prevent smuggling, this provision has been generally ignored by both parties.<sup>243</sup> Therefore, both authors argue that the parties should also be allowed to ignore the reversionary principle of the Treaty of Utrecht as it impedes the Gibraltarians right to self-determination.<sup>244</sup>

Bossano further argues that the international world in 1713 differs in many aspects from the present day.<sup>245</sup> Wars and treaties have changed the national borders worldwide,<sup>246</sup> and supporting Spain's claim would imply that nearly every European country could lay claim to the territory of another.<sup>247</sup> Moreover, applying Spain's rationale for its claim on Gibraltar would in fact give a theoretical claim by Morocco precedence over Spain's because the first people to settle in Gibraltar were Moors.<sup>248</sup>

## 2. *Failure of the International Community to Recognize Gibraltar's Right*

By supporting the Spanish claim of territorial unity based on geographical borders predating the Treaty of Utrecht, the United Nations has indicated that historic title can oust the right of self-determination.<sup>249</sup> However, both Lincoln and Bossano use Resolution 1514 (XV) to argue that Gibraltarians should be considered as a people as defined by Resolution 1514 (XV) and therefore should be given the right to self-

---

239. Lincoln, *supra* note 155, at 326; Bossano, *supra* note 193, at 1643.

240. See Treaty of Utrecht, *supra* note 168, at 330.

241. Lincoln, *supra* note 155, at 326.

242. See Treaty of Utrecht, *supra* note 168.

243. Lincoln, *supra* note 155, at 326.

244. See *id.* Cf. Bossano, *supra* note 193, at 1643.

245. See Bossano, *supra* note 199, at 1644.

246. See *id.* at 1643.

247. See *id.*

248. Cf. *id.*

249. MUSGRAVE, *supra* note 79, at 245.

determination.<sup>250</sup> The inhabitants of Gibraltar, even if considered to be “imported”, “have forged a unique cultural, political, and economic entity that is neither Spanish nor British[,]”<sup>251</sup> and have resided there “long enough to develop the required connection to it.”<sup>252</sup>

Gibraltar’s right to self-determination must include the right to be present during the negotiations between Spain and Great Britain.<sup>253</sup> The reversionary clause of the Treaty of Utrecht does not prevent Gibraltar from participating in the talks; it is only when full sovereignty would be transferred from Great Britain to the isthmus that the Treaty of Utrecht may be breached.

### 3. Conclusion

The interpretation of the United Nations that historic title may supersede the inhabitants’ right to self-determination could have far-reaching consequences because the modern day borders are mainly the result of numerous wars and peace treaties.<sup>254</sup> These consequences would not only exist on an international level but would manifest themselves also on national levels. If Gibraltar would achieve special status under the Spanish rule, as envisioned by Spain, then the constitutional positions of other Spanish regions, like Catalonia and Basque, would presumably have to be revisited as well because they could not be expected to settle for anything less than a similar status as Gibraltar.<sup>255</sup>

Furthermore, “[i]nfinitesimal smallness has never been seen as a reason to deny self-determination to a population.”<sup>256</sup> The practical implication of the right to self-determination for a small territory, such as Gibraltar, is the need for independent economic survival.<sup>257</sup> Economically, Gibraltar is trying to transform itself into an international tax haven, or offshore financial center (OFC),<sup>258</sup> claiming European

---

250. Lincoln, *supra* note 155, at 328; Bossano, *supra* note 193, at 1644.

251. Lincoln, *supra* note 155, at 328 (citations omitted).

252. Grant, *supra* note 125, at 636–37.

253. Lincoln, *supra* note 155, at 329.

254. See Bossano, *supra* note 193, at 1643.

255. See Franck & Hoffman, *supra* note 85, at 378.

256. *Id.* at 383.

257. See Orlow, *supra* note 124, at 125.

258. *Id.* at 132. Earlier, OFC’s were considered to be “the refuge of [both] international businesses trying to exploit currency exchange advantages and the extremely wealthy.” *Id.* at 128. Due to the internationalization of industries, there grew a need for international financial services. In response to this need, OFC’s started to furnish financial services that minimized tax exposure, transaction, and currency exchange costs. Smaller countries, particularly in Europe, seized this opportunity to serve as OFC’s based on the reciprocal tax treaties that allowed for the designation of the OFC as the site for the calculation of tax basis. *Id.* at 129. Thus, “OFC’s developed a market for [financial] services [based on the exploitation of] anomalies and asymmetries

Union membership based on Great Britain's membership in the European Union, with an exemption to the EC Custom Tariff and Common Agricultural Policy.<sup>259</sup> Gibraltar's economic transformation is adamantly opposed by Spain,<sup>260</sup> which claims that Gibraltar will serve as a haven for tax dodgers and money launderers.<sup>261</sup>

#### IV. THE CASE OF THE CHANNEL ISLANDS

##### A. *Introduction*

The Channel Islands are located at the entrance of the Gulf of Saint-Malo in the English Channel, eighty miles south of the English Coast.<sup>262</sup> These islands were part of the Duchy of Normandy before the Norman Conquest of 1066 and are considered to be in "appenage", or possessed by the British Crown.<sup>263</sup> The Channel Islands consist of two bailiwicks: Jersey and Guernsey. The bailiwick of Jersey is comprised of the islands of Jersey, Ecrehous, and Les Minquiers; the bailiwick of Guernsey consists of Guernsey, Alderney, Sark, Herm, Jethou, Lihou, and Brecqhou.<sup>264</sup>

Both bailiwicks are administered according to local laws and customs.<sup>265</sup> Governmental and judicial proceedings are conducted in English in Guernsey, although most inhabitants speak Norman French as their first language; Jersey uses French for its governmental proceedings. The British government, with prior consultation of the bailiwicks' local governments, may legislate matters relating to defense, foreign policy, and broadcasting.

##### B. *History of the Channel Islands' Acquisition*

Until around 6,500 B.C. the Channel Islands were connected with the French mainland.<sup>266</sup> With the invasion of the Roman legions in 50 B.C., Jersey became known as Caesarea, Guernsey as Sarnia, and Alderney

---

in the international financial markets [and] the lack of uniform financial controls between national jurisdictions." *Id.*

259. *See id.* at 132.

260. *Id.* at 132 n.168.

261. *Id.*

262. *See Channel Islands, supra* note 11, at 87.

263. *See id.*

264. *See id.*

265. *See id.*

266. *About the Bailiwick*, at <http://www.gov.gg/lcc/aa-history.htm> (last visited Dec. 29, 2002).

became Ridunia.<sup>267</sup> A stepping stone into France for the Vikings in the ninth century,<sup>268</sup> France tried to buy peace by granting the Norse land that later became known as the Duchy of Normandy.<sup>269</sup> Duke William II, the Conqueror (1035–87), seized the English throne in 1066 after the Battle of Hastings, and brought the Channel Islands, Normandy and England under the same jurisdiction.<sup>270</sup>

This Anglo-Norman empire was inherently unstable—when Richard the Lionheart died in 1199, claims to the throne were made by both Richard’s brother John and cousin Arthur.<sup>271</sup> War broke out, and in 1204 John was driven from the mainland part of the Duchy of Normandy and was only able to maintain the Channel Islands’ allegiance by promising them the continuance of their ancient laws and privileges, thereby laying the foundation for their self-government.<sup>272</sup> These islands were the target of frequent hit-and-run raids during the Hundred Years’ War between England and France.<sup>273</sup> The French made the tempting offer of union with France in exchange for a firm confirmation of self-government;<sup>274</sup> to keep the Channel Islands’ allegiance, King Edward III had to match the French offer and presented them a charter stipulating that the islands were entitled to “hold and retain all privileges, liberties, immunities and customs granted by our forbears or of other legal competency, and that they enjoy then freely without molestation by ourselves, our heirs or officers.”<sup>275</sup>

During the War of the Roses, the French took advantage of the feud between the Houses of York and Lancaster, capturing the islands in 1461 and holding them as part of Normandy for the next seven years.<sup>276</sup> In 1483, Edward IV of England and Louis XI of France agreed on the neutrality of the Channel Islands in any future conflicts between their countries.<sup>277</sup> Soon thereafter, these islands were divided into two bailiwicks for administrative purposes.<sup>278</sup>

---

267. *Id.* The Channel Islands were probably ruled from Lyons but there is evidence that Rome left the islands largely to their own devices, as Britain does today. *Id.*

268. *See id.*

269. *About the Bailiwick*, at <http://www.gov.gg/lcc/aa-norman.htm> (last visited Dec. 29, 2002).

270. *Id.*

271. *Id.*

272. *Id.*

273. *About the Bailiwick*, at <http://www.gov.gg/lcc/aa-created.htm> (last visited Dec. 29, 2002).

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

Between 1760 and 1815, many fortifications were built in the Channel Islands to protect them during the French wars against Great Britain.<sup>279</sup> During this period, the French made several attempts to recapture the Channel Islands, one of which nearly succeeded.<sup>280</sup> During the French Revolution, the Channel Islands became a refuge for French clergymen, aristocrats, and royalists;<sup>281</sup> initially, these refugees were welcomed but as time went by the islanders returned to regarding them with suspicion because they were considered to be the hereditary enemies of the Channel Islanders.<sup>282</sup> In 1794, the French Committee of Public Safety ordered the invasion of the Channel Islands,<sup>283</sup> but shortly before the attack the French realized that the costs of an invasion would far outweigh the gains, and the invasion plans were cancelled.<sup>284</sup>

The old dispute between Great Britain and France was revived in the late twentieth century because sovereignty over the Channel Islands determines the allocation of the economic development rights to the continental shelf.<sup>285</sup> Although the last serious attempt by the French government to gain control of the Channel Islands was in 1953, a group of French monarchists "invaded" the Channel Islands in 1998.<sup>286</sup>

### *C. Claim of Title: Conquest, Occupation, or Prescription?*

Customary international law has traditionally considered five methods by which a State can acquire territory: 1) accretion; 2) cession; 3) annexation

---

279. RAOUL LEMPRIERE, *HISTORY OF THE CHANNEL ISLANDS* 130 (1974).

280. *See id.* at 131. The first attempted invasion of Jersey was launched on May 1, 1779 by the Prince of Nassau, but it was not pressed home and no landing was effected. Less than two years later, on January 6, 1781, an expedition led by Baron de Rullecourt, a soldier of fortune, landed at La Rocque by night. Two battles ensued resulting in the signing of capitulation by the Jersey lieutenant-governor who was caught in bed at home by the invaders. The Jerseymen, refusing to obey the order to surrender, fought on and eventually defeated the French invasion. *See id.*

281. *See id.* at 133.

282. *See id.*

283. *See id.* at 135.

284. *See id.*

285. *See Channel Islands*, *supra* note 11, at 87.

286. *See* Carrissa Bub, *French 'invade' British Island*, BBC NEWS, Sept. 1, 1998, at <http://news.bbc.co.uk/1/hi/uk/162190.stm> (last visited Sept. 30, 2002). The invasion occurred in name of the King of Patagonia. *Id.* The marines of King Orelie-Antoine I stamped the name of the Kingdom of Patagonia on the Minquiers rocks and hoisted its flag. *Id.* Their statement included that this was the second royal landing after the initial landing on June 1, 1984 as a response to Britain's unacceptable occupation of the Falkland Islands, a territory of Patagonia. *Id.*

or conquest; 4) occupation; and, 5) prescription.<sup>287</sup> These different modes of acquisition are important to explain titles of sovereignty that go back in history.<sup>288</sup> While the theory behind each method of acquisition appears to be clear, the practice is not—the Channel Islands controversy involves three of the five methods.

Annexation or conquest generally involves the taking of territory during an armed conflict.<sup>289</sup> Up to the Second World War, this right of conquest was recognized as “the right of a military victor to sovereignty over the conquered territory and its inhabitants.”<sup>290</sup> To establish a conquest under customary international law, two requirements have to be fulfilled: 1) the conqueror must displace the previous sovereign in that territory; and, 2) the conqueror must transfer its own sovereignty over the conquered land by annexing it.<sup>291</sup> The Channel Islands were part of the French kingdom during the ninth century when they were invaded by the Vikings and used as a stepping stone for an invasion of France. When William the Conqueror defeated King Herald at the Battle of Hastings, he unified the Duchy of Normandy, including the Channel Islands, with the English Crown, effectively establishing English sovereignty over the Islands.

Occupation can be defined as “the act of appropriation by a state by which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another state.”<sup>292</sup> To establish a valid claim under occupation, the occupation must be effective.<sup>293</sup> This legal theory was further expanded by the *Las Palmas* arbitration<sup>294</sup> where the arbitral tribunal indicated that sovereignty involves “the exclusive right to display the activities of a state . . . and the continuous and peaceful display of the functions of State within a given region.”<sup>295</sup> In the case of small, isolated islands, the tribunal recognized that there is no absolute requirement to display sovereignty at every moment and in every place.<sup>296</sup> Rather, the geography of the territory may influence the manifestation of territorial sovereignty.<sup>297</sup>

---

287. Lee, *supra* note 99, at 1–2; Mueller, *supra* note 216, at 624.

288. Lee, *supra* note 99, at 2.

289. *Id.* at 10.

290. *Id.* at 10–11.

291. Mueller, *supra* note 216, at 627.

292. See Lee, *supra* note 99, at 3 (citation omitted).

293. See Mueller, *supra* note 216, at 629.

294. Island of Las Palmas Case (U.S. v. Neth.), 2 R.I.A.A. 829 (1928). This conflict arose between the United States and the Netherlands concerning the sovereignty over an isolated, but inhabited island located between the Philippines and the former Dutch East Indies. See *id.*

295. *Id.* at 839–40.

296. Brian K. Murphy, Comment, *Dangerous Ground: The Spratly Islands and International Law*, 1 OCEAN & COASTAL L.J. 187, 198 (1995).

297. *Id.*

The Channel Islands have been under the continuous control of the English Crown since the ninth century. People settled on the islands and a government and administration were gradually established. Even when King John was driven from the Duchy of Normandy in 1204, he emphasized the Channel Islands' importance by granting them a continuance of their ancient laws and privileges. Even though the French occupied the Channel Islands for a period of seven years starting in 1461 (and the Germans during the Second World War), this act cannot be considered influential enough to displace the continuous British possession of the Channel Islands.<sup>298</sup> Over the centuries, Great Britain has displayed activities of a state over the Channel Islands by protecting the territory from French invasions.

Prescriptive title over territory arises when one state extinguishes another state's title through adverse possession; there is no general rule that governs the necessary length of time to substantiate a prescriptive claim.<sup>299</sup> The requirements to be fulfilled are four-fold: 1) possession must be exercised by the State; 2) it must be peaceful and uninterrupted; 3) it must be public; and, 4) possession must endure for a certain length of time.<sup>300</sup> The French could claim that Great Britain's claim of possession over the Channel Islands though prescription of title is weak because the third requirement of peaceful and uninterrupted possession may not be satisfied. The Channel Islands have been subject of many French attacks and invasions over the centuries and the French have never fully relinquished their claim over these islands.

So far, the only time the ICJ has been called upon by Great Britain and France to decide the sovereignty issue regarding the Channel Islands, the dispute was limited to the Minquiers and Ecrehos, a group of isolated and uninhabited islets considered to be part of the bailiwick of Jersey.<sup>301</sup> The ICJ held that when an ambiguity exists, actual display of authority and evidence of possession are of decisive importance in determining sovereignty issues.<sup>302</sup> Although both parties produced treaties and other

---

298. See generally *Minquiers and Ecrehos* (Gr. Brit. v. Fr.) 1953 I.C.J. 47 (Nov. 17). In his individual opinion, Judge Levi Carneiro stated that Great Britain has always shown a continuous and keen interest in the Channel Islands as opposed to the French, who displayed a certain indifference or a much less lively and assiduous interest in the territory. *Id.* at 87 (Carneiro, J., individual opinion).

299. Lee, *supra* note 99, at 12–13. See also Mueller, *supra* note 216, at 631–32.

300. See Mueller, *supra* note 216, at 632–33.

301. See *Minquiers and Ecrehos*, *supra* note 298, at 47.

302. See *id.* at 70–71.



historical documents in an attempt to prove their respective ancient and historic title, the ICJ refused to resolve historical controversies and instead relied on evidence which related directly to the possession of the Channel Islands and not indirect inferences deduced from medieval events.<sup>303</sup> Finding that Great Britain has exercised jurisdiction and governmental authority over both islets, the Court established sovereignty in the British Crown.<sup>304</sup> However, this decision is limited to these particular islets and does not include the bailiwick of Guernsey or the island of Jersey. On the other hand, the ICJ's holding could be used to reinforce the British's claim of sovereignty over all the Channel Islands.<sup>305</sup> Thus, British sovereignty over the Channel Islands is based on the original conquest of these islands by the Vikings followed by acts of occupation by the British Crown, which indicate its continuing interest in the territory.<sup>306</sup>

#### *D. Is There a Case for Self-Determination?*

Unlike Gibraltar, Great Britain has always considered the Channel Islands to be a possession of the British Crown, not a colony; therefore the Channel Islands were not added to the list of non-self-governing and trust territories of Article 73 of the U.N. Charter.<sup>307</sup> However, even though the bailiwicks are not colonies, they are not integral parts of

---

303. See *id.* at 57.

304. See *id.* at 72. In 1959, the French Cour de Cassation (comparable to the U.S. Supreme Court) adopted this finding of the ICJ. David M. Reilly & Sarita Ordonez, Note, *Effect of the Jurisprudence of the International Court of Justice on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 435, 472 (1996). The French Cour de Cassation accepted as evidence of fact British sovereignty over the islands, although holding that the Channel Islands are outside British territorial waters. *Id.*

305. See Minquiers and Ecrehos, *supra* note 298, at 99 (Carneiro, J., individual opinion). In his individual opinion, Judge Levi Carneiro stated:

[j]ust as a State which has occupied the coast or an important part of an island is deemed to have occupied the island as a whole, the occupation of the principal islands of an archipelago must also be deemed to include the occupation of islets and rocks in the same archipelago, which have not been actually occupied by another State.

*Id.* (Carneiro, J., individual opinion).

306. As Judge Levi Carneiro stated in his individual opinion in Minquiers and Ecrehos:

[t]he origin of the occupation of the islands [Minquiers and Ecrehos] by the English being clearly defined and the circumstances confirming that occupation being acknowledged, the acts carried out during this occupation, although they are scattered in time, bear witness to the continuity of that occupation and reflect the "slow evolution" of the process whereby sovereignty is established.

*Id.* at 104 (Carneiro, J., individual opinion).

307. See *Britain's Deficient Democracy*, at <http://www.centreforcitizenship.org/over.html> (last visited Dec. 29, 2002). This status of "Crown Dependency" can be compared to the situation of Puerto Rico and Guam vis-à-vis the United States. *Id.*

Great Britain; despite the fact that the residents of the islands are British citizens, they are not citizens of the European Union and they are not entitled to vote for representatives at Westminster as these islands have their own independent judiciary and legislature.<sup>308</sup>

As is Gibraltar, the Channel Islands are a small state with an international status as a tax haven.<sup>309</sup> The Channel Islands market themselves as being "all things to all tax avoiders" and they refuse to be considered as a "pet haven" of Great Britain.<sup>310</sup> Because both bailiwicks have their own legislature and judiciary, they maintain lower personal and corporate tax rates than Great Britain.<sup>311</sup>

The Islanders' desire to maintain this *status quo* can be attributed to the success of their economy and the high standard of living in the bailiwicks.<sup>312</sup> Their situation can be considered as a manifestation of the internal right to self-determination because the Channel Islands have maintained their own political, economic, social, and cultural development within the framework of an existing state.<sup>313</sup>

## V. CONCLUSION

The concept of self-determination has been in constant evolution. The first major codification of the principle resulted in Resolution 1514 (XV), which indicated that all peoples have a right to self-determination. What constitutes "peoples" for the purposes of this resolution has evolved over the years from the limited definition of territorially defined populations to the broad interpretation of national or ethnic cultural minorities wishing to live according to their own traditions and customs. This right to self-determination is, according to paragraph 6 of Resolution 1514 (XV), subject to the internationally recognized principle of territorial integrity, even if the claim for territorial unity is based on historic title. However, the ICJ in *Namibia* and *Western Sahara* seems to indicate that a claim for return of territory based on historic title is subordinate to the inhabitants' right of self-determination.

---

308. *Id.*

309. See Orlow, *supra* note 124, at 127. "A country is considered to be an international tax haven when foreign persons, corporate or individual, receive respite from their own domestic tax system." *Id.*

310. *Id.* at 130.

311. See *id.* at 134. In Jersey, financial services have replaced agriculture and tourism as the main source of income. *Id.* at 134 n.194.

312. See *Britain's Deficient Democracy*, *supra* note 307.

313. Van der Vyver, *supra* note 104, at 11.

By including Gibraltar in the list of non-self-governing and trust territories of Article 73 of the U.N. Charter, Great Britain demonstrated that it considered the territory a colony. The people of Gibraltar are territoriality and culturally distinct from their British colonizer; therefore they can be considered as “peoples” under Resolution 1514 (XV) and thus have the right to self-determination. When the U.N. General Assembly issued Resolution 2353, stating that the Spanish claim for territorial unity based on the Treaty of Utrecht takes precedence over Gibraltar’s right to self-determination, it did not follow the ICJ’s decision in *Western Sahara*. Although Spain would like to affect a return to its territorial integrity of 1704, the wishes of the people of Gibraltar should come first. Any other outcome would end in the reshaping of the world’s landscape because most current borders are the result of numerous wars and peace treaties.

Because of its unique character as a possession of the British Crown, the Channel Islands were not included in the list of non-self-governing and trust territories. Although being territoriality and culturally distinct from Great Britain, the people of the Channel Islands could be qualified as peoples under Resolution 1514 (XV) and therefore claim a right to self-determination. Over the years, the Channel Islands have developed their own judiciary, legislature, and economy; they only rely on the mainland for defense and foreign affairs. As such, it could be claimed that the Channel Islands have effectively received an internal right to self-determination. As long as Westminster does not encroach on their independence, the economy is stable, and France does not seriously pursue a dubious historic claim over these islands, no external right for self-determination needs to be claimed.